Supreme Court, U.S.
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No. 03-1055

In The
Supreme Court of the United States

STEVEN H. STERN, etc.,

Cross-Petitioner,

v.

DAVID A. GILL, CHAPTER 7 TRUSTEE,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

Cross-Petitioner Steven H. Stern ("Stern") conditionally seeks a Writ of Certiorari ("Conditional Petition") with regard to the unanimous conclusion of the Ninth Circuit Court of Appeals, as well as of the District Court below it, that the pension plan was not excluded from Stern's bankruptcy estate because, on the petition date, there was no covered employee. Stern seeks a Writ of Certiorari on this point only in the event that this Court grants Petitioner, David A. Gill, Chapter 7 Trustee ("Trustee") his Writ of Certiorari ("Petition"). The core of the Conditional Petition is the assertion that the Ninth Circuit's Amended Opinion below " . . . creates an exception not otherwise found in the ERISA statutes and permits a plan's qualification to ebb and flow due to the mere attrition of employees . . . " Conditional Petition at page 9. The Amended Opinion, it is asserted, conflicts with the decisions of other circuits, Conditional Petition at page 10, and presents a body of questions that will arise upon this Court's consideration of the case now before it, *Yates v. Hendon*, ___ U.S. ___, 123 S.Ct. 2627 (2003), Conditional Petition at page 12. The Conditional Petition should be denied even upon the granting of the Trustee's Petition. The issue made the subject of the Conditional Petition, is neither of sufficient importance, nor is it the subject of conflict among the circuits, to merit granting the Conditional Petition.

ARGUMENT

Analysis begins with the applicable statutes. As set forth at page 2 of the Conditional Petition, a pension plan is ERISA qualified only " . . . to the extent that by its

express terms or as a result of the surrounding circumstances [it] . . . provides retirement income to employees." 29 U.S. Code § 1002(2)(A)(i). Regulations issued under this section, at pages 3 to 4 of the Conditional Petition, make clear that "[a]n individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse." 29 C.F.R. § 2510.3-3(c)(1).

It is undisputed that on the date of Stern's bankruptcy petition, the very circumstances outlined above described the condition of his plan. The plan covered only Stern, the owner, and his wife. On the face of the applicable regulations, the Ninth Circuit correctly concluded that the plan was not ERISA qualified, hence not excluded from Stern's bankruptcy estate.

To avoid this result, the Conditional Petition argues that the Amended Opinion of the Ninth Circuit below erroneously ignores the problem of the "ebb and flow" of qualification after formation of a plan, Conditional Petition at page 9. In this, Stern mischaracterizes the issue. This case does not present an issue of plan termination as suggested by Stern's citation of 29 U.S. Code § 1341 at page 3 of the Conditional Petition. Those termination provisions were designed, as the Ninth Circuit itself noted in its prior decision of *In re Lowenschuss*, 171 F.3d 673 (9th Cir. 1999), cert. denied, 528 U.S. 877 (1999) to give notice to those whose interests are impacted. By contrast, in *Lowenschuss* and here, the debtor occupied all the positions. He was the sole shareholder of the corporation (Conditional Petition at page 6), plan administrator (Petition, Appendix 62), and as of the petition date, Stern

was the husband of the only employee formerly participating in the plan. For these reasons, here, as in *Lowenschuss*, the purposes of the ERISA termination provisions to protect arm's length employees from abuse is absent, there was no such arm's length employee to protect. The "ebb and flow" issue is therefore not present and the Ninth Circuit correctly assessed the issue of plan qualification as of the date of the bankruptcy petition.

The sole owner of a corporation is not an employee for purposes of ERISA, nor are the owner and spouse, and this has been uniformly held. *See Matinchek v. John Alden Life Ins. Co.*, 93 F.3d 96 (3d Cir. 1996) (holding that plan covering only sole business owner and his or her immediate family members cannot qualify as employee welfare benefit plan under ERISA); *Peterson v. American Life & Health Ins. Co.*, 48 F.3d 404 (9th Cir. 1995) (same); *Meredith v. Time Ins. Co.*, 980 F.2d 352 (9th Cir. 1993) (same); *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992) (same); *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989) (holding that sole shareholder employed by company he owned was "employer" for the purposes of ERISA); *Schwartz v. Gordon*, 761 F.2d 864 (2d Cir. 1985) (holding that sole proprietors cannot have dual status under ERISA as employer and employee); *In re Watson*, 161 F.3d 653 F.2d 424 (10th Cir. 1981) (holding that sole owner of medical corporation is not an "employee" for purposes of ERISA).

Beyond the plain language of the statute and its purpose being adhered to by the Ninth Circuit, it is clear that the Ninth Circuit is not in conflict with other circuits. The principal conflict asserted is that supposedly with *Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d

444 (4th Cir. 1993), Conditional Petition at page 10. No such conflict exists. In *Madonia*, a two step analysis was adopted. The first step required that the sole owner establish that the employee benefit plan benefited other employees. Only thereafter did the Fourth Circuit seek to determine if a common law employee was a participant. There is no dispute here that there were no other arm's length employees and therefore *Madonia* is inapplicable. Similarly, *In re Baker*, 114 F.3d 636 (7th Cir. 1997) is inapposite. There was no dispute there that multiple employees were involved on the formation of the plan and to the extent that *Baker* then deals with the attrition ("ebb and flow") issue identified in the Conditional Petition, *Baker* is inapplicable here because the attrition issue is not present. This is so because the policy concerns of notice to independent, arm's length employees noted above are not implicated.

Finally, nothing in *Yates v. Hendon* will raise questions that this case could resolve. As noted in the Petition, *Yates v. Hendon* deals with the issue of whether or not, if the debtor is one but not all of a plan's covered employees, the plan has lost its ERISA qualification as to the debtor. It is clear that the question presented to this Court in *Yates* begins with the premise that " . . . a plan whose sole beneficiaries are the company's owners cannot qualify as an employee benefit plan under ERISA." *Yates v. Hendon*, Brief for Petitioner, 2003 WL 21939861 at page 22. From that premise, the proposition presented by the petitioner is stated as: "[i]t is clear from a plain reading of [29 CRF 2510-3-3(a), (b) and (c)] that Yates should not be excluded from being a participant in the Profit Sharing Plan because other non-owner employees participated in the Profit Sharing Plan." *Yates v. Hendon*, Reply Brief, 2003

WL 22437575 at page 8. That is not the fact pattern here. Here, there are no non-owner, or arm's length employees. As noted above, multiple employees implicate different policy issues than the presence of a single individual who is no longer a covered employee. There is no relation between the issues before this Court in *Yates v. Hendon* and the issues here.

CONCLUSION

For all the reasons set forth herein, it is respectfully submitted that even if the Court grants the Petition, it should not grant the Conditional Petition. The Trustee urges the Court to grant his Petition.

Respectfully submitted,

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